Law 443: Law Creditors’ Remedies

God Save Queen Elizabeth II! God Save Elizabeth Edinger!

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# Regulation of the Credit System and Extra-Judicial Debt Collection

## Business Practices and Consumer Protection Act

*BCPCA*, Part 7: contains prohibitions and sets standard of conduct for debt collectors.

S. 113: defines “collector”: “a person, whether in British Columbia or not, who is collecting or attempting to collect a debt.” (BCPCA does not apply to sheriff or court bailiff directly, but via the law of contract.)

S. 114(1): debt collectors must not communicate/attempt to communicate with debtor, debtor’s family/member of household/relative/friend/neighbour/acquaintance, in a way that constitutes harassment.

S. 114(2): deems harassment to include the use of (a) threatening/intimidating/coercive/profane language, (b) undue/excessive/unreasonable pressure, (c) publishing/threatening to publish debtor’s failure to pay.

S. 116 governs communication by collector with debtor.

S. 117 governs communications by collector with debtor’s family/member of household/relative/friend/neighbour/ acquaintance.

S. 118 limits when the collector can call the debtor.

S. 120 prohibits the collector from collecting from people not liable for debt or for an amount in excess of the debt.

*BCPCA*, Part 10: contains enforcement provisions.

S. 171: continues cause of action for contravention of provisions of the *BCPCA* that resulted in a loss.

S. 173: (1): a party commencing an action under s. 171 must notify the director. (2): the director, in turn, may intervene in the case. (3): even if the director is not notified, the court has the discretion to allow the action to proceed.

# Laws Relating to the Judgment

## Default Judgments

* *Bache Halsey Stuart Shields Inc. v. Charles et al; Dobell, Third Party* (1982) 140 D.L.R. (3d) 378 (B.C.S.C.):

-The Court may set aside a default judgment where there has been a breach of natural justice.

-A judgment given without notice to the defendant is not a mere procedural irregularity but is contrary to the rules of natural justice and is capable of being declared a nullity.

-If the judgment is declared a nullity, all enforcement processes arising from the judgment must cease.

*Miracle Feeds v. D. & H. Enterprises* (1979) B.C.L.R. 58:

-Test for setting aside a default judgment:

1.) The defendant did not willfully or deliberately fail to enter an appearance or file a defence.

2.) The defendant made an application to set aside the default judgment as soon as reasonably possible after learning of the judgment/give an explanation for any delay in making the application.

3.) The defendant has a meritorious defence or a defence worthy of investigation.

4.) The above requirements will be established to the satisfaction of the court through affidavits provided by the defendant.

## Interest

*Court Order Interest Act*, Part 1: governs pre-judgment interest. Pre-judgment interest runs from date when cause of action arose

*Court Order Interest Act*, Part 2: governs post-judgment interest. Post-judgment interest runs from the date of the judgment or the date that money is payable under the judgment.

## Limitation Periods

*Limitation Act*, s. 7: the life of a judgment in BC is 10 years.

-After the expiration of ten years, the judgment creditor may not bring an action on a local judgment for the payment of money or return of personal property.

-Actions on extra-provincial judgements:

-A judgment creditor must not bring an action on an extraprovincial judgment after the time for the enforcement of that judgment has expired in the jurisdiction where the judgment was made, or

-A judgment creditor must not bring an action on an extraprovincial judgment later than 10 years after the judgment became enforceable in the jurisdiction where it was made.

-Exceptions:

-S. 23: if there is an unexpired writ of execution at the time that the limitation period expires, then the judgment creditor may enforce that writ. (Note: since writs are good for one year, this allows for a maximum one-year extension.) For proceedings against land, you can get two more years. For charging orders, there is no specific time period.

-S. 23(2): stays of execution stop the limitation clock and lengthen the time available for execution.

-S. 24: if judgment debtor confirms the cause of action by acknowledging it in writing (with signature or electronic signature), then the clock resets.

*Young v. Verigin*, 2007 BCCA 551:

-The judgment creditor can bring a local action on BC judgment in order to extend the limitation period by up to another 10 years.

-However, if the court finds that the second action is an abuse of process, then the judgment creditor will not be permitted to proceed with the second action.

-The burden of proof for establishing that the second action is an abuse of process falls on the judgment debtor.

## Foreign Judgments

In order to enforce a foreign judgment in BC, the judgment must be

1. final and conclusive;
2. the court must have had jurisdiction in the international sense.

*De Savoye v. Morguard Investments Ltd. et al*., [1990] 3 S.C.R. 1077:

-There are three ways for a court to have jurisdiction in the international sense:

1.) Defendant was present in the court’s jurisdiction at the time the action was commenced; or

2.) The defendant submitted to the jurisdiction of the court; or

3.) There was a “real and substantial connection” between the court and the action.

*Pro Swing* *Inc. v. Elta Golf Inc.*, 2006 SCC 52:

-Non-pecuniary equitable orders from foreign jurisdictions are enforceable provided that they meet the *Morguard* test.

*Enforcement of Canadian Judgments and Decrees Act*:

-Allows for registration and enforcement of judgments from other Canadian jurisdictions.

*COEA*, Part 2:

-Simplified recognition and enforcement procedures for reciprocating jurisdictions. Includes Canada (except for treasonous separatists in Quebec), all the Australian states, Germany, Austria, UK, and the American states of Washington, California, Oregon, Colorado, and Idaho.

-Enforcement of foreign prejudgment garnishing orders and *Mareva* injunctions is not allowed.

# Stays of Execution

*Morguard Real Estate Investment Trust v. Davidson*, 2001 BCCA 735:

-The test for a stay of execution pending appeal is the same as the test for an injunction per *RJR MacDonald*:

-1.) Is there a serious matter to be tried/arguable case (good grounds for appeal)?

-2.) Will irreparable harm result from a refusal to stay? (no evidence in this case; fails this question)

-3.) The balance of convenience. For this stage, consider the following factors (in conjunction with the factors from *AG v. Lau & Lau* if appropriate):

i) Necessity of preserving the subject matter of the litigation.

ii) Prevention of irremediable damage.

iii) Consideration of existing special circumstances.

*Voth Bros. Construction (1974) v. National Bank of Canada*, 12 B.C.L.R. (2d) 43 (B.C.C.A.):

-Where a significant amount of money is involved, the court may order a stay of execution on appeal where the defendant pays the funds into court and the court orders payment out to the plaintiff on terms. These terms include that the plaintiff will have to pay the defendant interest on the funds if the defendant is ultimately successful, and that the plaintiff will need to provide security for the amount paid by the defendant plus the defendant’s costs if it is successful on appeal.

*Attorney General v. Lau & Lau*, 2002 BCSC 1155:

-The court discusses a number of principles that may be considered for cases involving stays of execution. May come up on balance of convenience. May apply to non-appeal cases.

1.) The court has the inherent jurisdiction to order stays of execution in special circumstances.

2.) The court will consider the balance of convenience in determining whether it is appropriate to grant a stay.

3.) The Court has inherent jurisdiction to grant stays where required by “justice between the parties” and in order to avoid unnecessary proceedings and expense.

4.) The Court will weigh the relative prejudice to the parties (for example, will one party lose everything if the stay is granted or not?)

5.) To enable the Court to protect either litigant.

6.) Consider whether there is an outstanding appeal.

7.) To allow a judgment debtor sufficient time to prosecute a counterclaim against the judgment creditor.

*Litecubes, LLC v. Northern Light Products Inc*., 2007 BCSC 1545:

-For foreign judgments, Rule 19-3(9) of the *SCCR* requires that the Court grant the defendant’s application for a stay of proceedings if the foreign judgment is currently under appeal.

*COEA*, s. 48(2): Court may make order payable by installments or suspend execution.

# Information Acquisition Procedures

There are three kinds of information acquisition procedures in BC: Examination in Aid of Execution (*SCCR*, Rule 13-4); Subpoena to Debtor (*SCCR*, Rule 13-3), and Payment Hearing (*Small Claims Rules*, Rule 12).

**Examination in Aid of Execution**

-Does not lead to a binding order for payment and does not have built-in contempt provisions such as an automatic bench warrant for failure to attend (although general contempt provisions are available).

-Provides the judgment creditor with a greater range of information about the judgment debtor. This procedure is most useful for finding out information about the judgment debtor.

-Obligation on debtor to bring documents related to debt and ability to pay.

-Personal service is not required.

-Not limited to monetary judgments.

-Creditor must provide conduct money.

**Subpoena to Debtor**

-May lead to a binding order for payment and has built in contempt proceedings (bench warrant for failure to attend hearing): *SCCR*, 13-3(9).

-Unreasonable failure to pay is contempt is contempt: *SCCR*, 13-3(10).

-No obligation on debtor to bring documents.

-Creditor may cross-examine debtor on documents that he or she has already obtained.

-Requires personal service.

-Limited to monetary judgments.

-Creditor must provide conduct money.

*Blaxland v. Fuller*, 2004 BCSC 1338:

-Committal order for contempt involving Subpoena to Debtor hearing. Case sets out the process for committing a contemptuous judgment debtor to prison.

-Court originally imposed 40-day sentence on judgment debtor for failing to attend hearing and failing to pay installments that were ordered at the hearing. Another 40-day sentence was ordered after the judgment debtor stayed the proceedings.

-Case states that the judgment debtor is entitled to appear before the Court and explain his or her actions.

-Judgment debt will survive during the judgment debtor’s commitment.

-Contempt is a civil matter but is still determined on a beyond a reasonable doubt standard.

# Attachment of Debts

## Stages in the Attachment of Debt process in BC

-1.) Issuance of garnishing order (*ex parte* application at the court registry);

-2.) Service of garnishing order on garnishee;

-3.) Garnishee pays funds into Court;

-4.) Funds are paid out of court to the judgment creditor.

**1.)** Issuance of Garnishing Order:

-There must be a debt (debt, obligation, or liability) in existence within the meaning of the *COEA* at the time that the garnishing order is issued. If there was no debt at time of issuance, then the garnishing order will be set aside by the Court. S. 3(1) contains definition—includes wages and salaries due within seven days.

-A copy of the garnishing order must be served on the defendant/judgment debtor at once or within a time allowed by the Court. Failure to serve the garnishing order within a reasonable period of time is a ground to set aside the garnishing order: see *Pybus*.

*Canadian Bank of Commerce v. Dabrowski, Dabrowski and Hunt* [1954] B.C.J. No. 72 (B.C.S.C.):

-Facts: CBC gets garnishment order against auctioneer at 10 am, auction takes place at 11:30 am. BMO issues another garnishment order after the auction. BMO’s garnishing order is valid; CBC’s is not valid.

-Ratio: there must be a debt in existence at the time of issuance. Issuance, not service, is the critical time.

**2.)** Service of Garnishing Order:

-Garnishee must be served before the debt is paid out.

*Central Trust v. Merrithew*:

-Facts: Garnishee is bank. At the time that the garnishor issues the garnishing order, there is a debt in existence because the debtor has an account with the garnishee containing $0.41. At 3 pm that same day, $3,300 had been deposited into the account. However, by 4 pm, the $3,300 has been withdrawn. Garnishment order isn’t given to manager until after 4 pm (originally served on teller). Garnishor only gets $0.41.

-Ratio: timing is important for service of garnishing order. For service of garnishing order on a bank, the manager needs to be served, not the teller.

**3.)** Payment into court by garnishee:

-Garnishee must pay funds into Court or dispute liability; otherwise, the garnishee will become personally liable for the debt and costs.

## Definition of Attachable Property

*COEA*, ss. 1 and 3 of the COEA state which debts are attachable:

-S. 1: “debt or money accruing due” includes wages or salary that would become payable within 7 days.

-S. 3(1): “debt due” and “debts due” include wages and salary payable within 7 days. “Debts, obligations, and liabilities” include obligations or liabilities arising out of trust or contract where judgment has been recovered against the garnishee (but not where judgment has not been recovered) and all claims under trust or contract where equitable execution would be available.

*Vater v. Styles and Metropolitan Life Ins. Co.* (1930) 42 B.C.R. 463 (B.C.C.A.):

-Facts: judgment creditor issues garnishing order and serves it on insurance company that it making payments to the judgment debtor on a disability insurance policy. In order for judgment debtor to receive payment under policy that judgment creditor seeks to garnish, the judgment debtor must be alive and still disabled at the future date when he is to receive payment.

-Ratio: a debt that is dependent on a condition happening in the future is not due or accruing due at the time of issuance. (Note: had the garnishing order been served on the day that the payment was due, then it would have been a valid order.)

*Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd. and Bank of Montreal*, [1975] B.C.J. No. 1150:

-Facts: judgment debtor has term deposit at BMO that was due to mature soon. Judgment creditor serves garnishing order on BMO for term deposit. Term deposit contract says that withdrawal may be made with seven days notice.

-Ratio: term deposits are attachable provided that terms are complied with. Terms attached to bank account or term deposit are mere matters of procedure and administration and are not conditions that affect the existence of the debt.

*Bank Act*, s. 421:

-If you are going to garnish a bank account, you must serve the garnishing order on the branch where the account is located.

*Masri v. Consolidated Contractors*:

-English Court of Appeal case.

-Court grants a world-wife equitable receiver that can collect future debts as well as those not yet due and payable. Not adopted in BC yet. If it is adopted, it will allow for the attachment of future debts by way of equitable execution.

Joint Debts: if both joint owners of the debt are judgment debtors, then the judgment creditor can garnish the debt; however, if one is a judgment debtor and the other is not, then it is not garnishable because garnishment would violate the *nemo dat* principle. Equitable execution is still available.

## Garnishment of Rent

*Access Mortgage Group Ltd. v. Stuart* (1984), 6 D.L.R. (4th) 260:

-Rent that is due in the future is not “payable or accruing due” within the meaning of the *COEA*. You cannot issue and serve a garnishing order before the rent due date, although overdue rent is attachable.

**Conveyancing**

*Ahaus Developments Ltd. v. Savage*, [1994] B.C.J. No. 1455 (B.C.C.A):

-Purchase moneys held in a conveyancing transaction by a lawyer or notary are attachable.

-A lawyer or notary who is served with a garnishing order that conflicts with an undertaking should file a dispute note. Doing nothing results in personal liability for the debt.

**Retainers**

*Gervais (Guardian ad litem of) v. Yewdale* (1993), 86 B.C.L.R. (2) 374 (B.C.S.C.):

-True retainers (retainers which may never be repaid to the client) are not debts due or accruing due to the client. As such, true retainers are exempt from garnishment. A hearing with affidavit evidence may be necessary to determine whether a retainer is a true retainer.

## RRSPs

-S. 71.3(2) of the *COEA* exempts RRSPs, RRIFs, and Deferred Profit Sharing Plans (DPSPs) from execution by “any enforcement process” “despite any other enactment”.

-S. 71.3(3) allows for garnishment of amounts paid into a registered plan within the past twelve months (s. 71.3(3)(a)), property that has or is being paid out of a registered plan (b), enforcement processes under the *Family Maintenance Enforcement Act* (c), or an enforcement process initiated against a registered plan before November 1, 2008 (d).

## Builders’ Lien Holdbacks

-*Builders’ Lien Act* s. 13(1): if a holdback is garnished and paid into court, the funds are subject to trust the garnishor’s claim against the funds will rank behind those of the beneficiaries of the trust.

## Pre-judgment Garnishment

Pre-judgment garnishing orders are available for debts or liquidated demands. For unliquidated claims, the judgment creditor should seek a *Mareva* injunction instead of a pre-judgment garnishing order.

*COEA*, s. 3(4) prevents pre-judgment garnishment of wages or salary.

*COEA*, s. 3(2)(d)(i): there must be a pending action (you cannot get a pre-judgment garnishing order before filing the notice of civil claim, although you can file them together).

*COEA*, s. 3(2)(d)(v): the amount being garnished must be “justly due and owing, after making all just discounts.” Failure to make just discounts is a defence.

*COEA*, s. 5: the Court has the discretion to replace an order for payment with installments or release the part or the entire amount garnished from Court to the defendant where doing so is “just in all the circumstances.” See *Redekopp Mills*.

*Lister v. Stubbs* (1890) 45 Ch. D. 1.:

-Traditional common law rule that a creditor may not interfere with the property of the debtor prior to judgment. This rule has been modified in BC.

*Knowles v. Peter* (1954) 12 W.W.R. (N.S.) 560 (B.C.S.C.):

-Pre-judgment garnishment is an extraordinary process which requires meticulous observance to the requirements of the *COEA*. Cause of action must be stated with sufficient particularity.

-If compliance does not meet this standard, the garnishing order will be set aside.

*Myron Balango & Associates Ltd. v. Rajan* (1999) (B.C.S.C.):

-Meticulous observance as discussed in *Knowles* does not require technical perfection or ridiculous compliance.

-The pre-judgment garnishing order must be written so that no one is misled by it, even if they may be momentarily puzzled. The document as a whole must clearly inform the reader of its true message, and there must be no confusion or uncertainty of what the document means.

*Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp*., 1999 BCCA 78:

-Facts: claim was for commission or compensation on a *quantum meruit* basis. Defendant tries to defeat a pre-judgment garnishing order by arguing that the claim in question is not a debt or liquidated demand and that it was not set out with sufficient particularity.

-Ratio: in order to meet the test for a pre-judgment garnishing order under the *COEA*, the amount claimed must either be a debt or a liquidated demand. -The amount must be a specific amount of money due under a contract. It can be a specific sum or an amount that can be ascertained using arithmetic. -If the sum requires calculation or investigation beyond mere calculation, it is not a debt or liquidated demand but rather “damages.”

*Redekopp Mills Ltd. v. Canadian Timber Management & Reforestations Inc.* (1998) (B.C.S.C.):

-Case deals with s. 5 of the *COEA*.

-Facts: defendant’s bank account is garnished and paid into Court. Bank account is the only exigible asset it has in BC. Defendant argues that if it does not have access to the money, its business will be destroyed and other creditors will be prejudiced. Court exercises discretion under s. 5 to release some of the garnished funds back to the defendant.

-Ratio: the Court must consider various factors in determining what is “just in all the circumstances.” The onus is on the defendant to make these factors out:

-The strength of the plaintiff’s case.

-Hardship to the defendant—does the attachment cause hardship?

-Necessity—is attachment necessary to ensure that the plaintiff can recover if his or her claim is successful?

*Pybus v. National Credit Counsellors*, 2006 BCSC 1196:

-Facts: plaintiff issued and served pre-judgment garnishing orders. Defendant argues that the garnishing orders should be set aside on the grounds that 1.) the garnishing orders were not served in a timely fashion after the defendant had requested that they be served, 2.) the plaintiff did not make a claim for a liquidated amount, and 3.) the plaintiff failed to make just discounts. Court sets aside garnishing orders.

-Ratio: if the defendant asks for a copy of the order or the notice of civil claim to be served on him, and the plaintiff fails to do so, then the garnishing order will be set aside for failure to comply with s. 9(2) of the *COEA*.

-Imperfect compliance makes the garnishing order voidable, not void. Court has the discretion to uphold the garnishing order. Just discounts often comes up where there are counter claims.

## Jurisdiction

-*COEA*, s. 3(2)(e): garnishee must be located in the province.

*Bank of Nova Scotia v. Mitchell*, [1981] B.C.J. No. 654 (B.C.C.A.):

-Case interprets and applies s. 462(1) of the *Bank Act*. Even if the debt is ordinarily payable in another province, you can serve a branch in BC provided that you also serve *ex juris* the extra-provincial branch where the account is located. Bank Act didn’t apply

-Debt does not need to be located in the province; only the garnishee needs to be located.

-S. 462 does not apply where the defendant is receiving wages from a bank which are being garnished.

*Univar Canada v. PCL Packaging Corp*., 2007 BCSC 1737:

-Another interpretation and application of s. 462. If the garnishee is a bank, and the bank has a branch in BC, then you can garnish the account even if the account is not physically located in BC. It does not matter where the account is located. Extra-provincial branch must be served *ex juris*.

-Note: this interpretation of s. 462 is probably wrong, since it allows seizure of debt that is not in BC. However, it hasn’t been appealed or overruled and is available to judgment creditors.

## Priorities

*COEA*, s. 9(1): service of garnishing order binds the debt at time of service. Interpreted differently in pre- and post-judgment cases.

*COEA*, s. 11: order absolute results in garnishee being personally liable if fails to pay.

*BC Millwork Products Ltd. v. Overhead Door Sales (Vancouver) Ltd.*, [1961] 34 W.W.R. 86:

-Facts: defendant is sued by two plaintiffs, one claiming $18,000 and the other claiming $6,500 (claims are filed on same day). One plaintiff obtains pre-judgment garnishing order and $3,287 is paid into court. The other plaintiff obtains default judgment first and applies for equitable charging order over funds in court. Three days later, the plaintiff who got the garnishing order also gets default judgment. Who gets the money?

-Ratio: only a judgment creditor is entitled to an equitable charging order. Charges take priority in the order that they become charges.

*Pacific Forest Industries Ltd. v. Twin Stag Timber Ltd*., [1985] B.C.J. No. 2298 (B.C.C.A.):

-Director of Employment Standards has super priority over funds held in court under the Employment Standards Act. The priority takes the form of a statutory lien that attaches to the funds in court and will outrank other creditors.

## Material Disclosure and Trickery

*Evans v. Silicon Valley IPO Network*, 2004 BCCA 149:

-Garnishing orders may be set aside for material non-disclosure. Garnishing orders are made *ex parte* and counsel requesting a garnishing order must provide full and frank disclosure.

-If the plaintiff knows that the garnishee is under a freezing order and asks for a garnishing order anyway without disclosing the existence of the freezing order to the court, the garnishee should not be held liable for its inability to pay the garnished funds into court. You have to tell the court if there are other parties that might have claims (relates to priority).

# Execution By Writ of Seizure and Sale

Steps for execution by writ of seizure and sale:

1. Issuance of writ by judgment creditor.
2. Delivery of writ by judgment creditor to the court bailiff. Court bailiff then executes writs in order which they are received.
3. Entering property with of writ by court bailiff. Judgment creditor must be careful not to convert the court bailiff into an agent by giving specific directions; however, maximum information should be given.
4. Seizure by court bailiff. May take the form of a walking possession agreement.
5. Sale of seized goods by court bailiff. May take form of auction or private sale. Court bailiff is not obligated to accept highest bid.
6. Sheriff takes poundage.
7. Payment by sheriff to creditors pursuant to the *Creditor Assistance Act*.

*-Law and Equity Act*, s. 35(1): writ of execution binds goods at time of seizure, not at time of issuance as under the common law.

*Lloyds and Scottish Finance v. Modern Cars and Caravans (Kingston) Ltd*., [1966] 1 Q.B. 764 (C.A.):

-UK Court of Appeal case involving a writ of *fieri facias*.

-Walking possession orders are a valid form of seizure by the sheriff. Signature will help prove there was a walking possession; lack of signature is not fatal.

-Abandonment: did the sheriff intend to abandon seizure? Lots of visits shows intention not to abandon.

*Boyce (Re) (T.D.)*, [1992] F.C.J. No. 1064:

-A writ of seizure and sale is sufficient to get at the contents of a safety deposit box. The court bailiff does not need to obtain a drilling order in addition to the writ.

-If the safety deposit box is empty, then the sheriff will not be guilty of trespassing.

-Court bailiff cannot enter the dwelling house of a judgment debtor or third party where the judgment debtor’s property is stored by force against the will of that person. This rule does not apply to commercial buildings.

-Once the court bailiff is inside, he or she may break open doors and chests within the house.

-curtilage: living space outside of home. Cannot break into that property. Includes cars on driveway.

*Cybulski v. Bertrand*, 2000 BCSC 623:

-Facts: counsel for judgment creditor gets writ of seizure and sale for Canada Post trucks.

-Ratio: Crown property (includes leased property) is immune from seizure and sale. If counsel tries to get a writ of seizure and sale for Crown property, they may end up being personally liable for costs.

## Execution against Goods, Chattels and Effects

*-COEA*, s. 55 states that “all goods, chattels, and effects of a judgment debtor” are exigible under a writ of seizure and sale subject to exemptions in sections 70 through 79. “Goods, chattels, and effects” are not defined in the statue. Looks to the case law below.

*Bank of B.C. v. 225280 B.C. Ltd. (1)* (1985) (B.C.S.C.):

-Facts: judgment creditor attempts to execute against RRSP.

-Ratio: goods, chattels, and effects are limited to tangible personal property. This excludes shares. Overturns approach in *Vancouver A&W Drive-Ins v. United Food Services* (1981), which defined s. 55 to include all personal property and include shares held in a RRSP.

*Mortil v. International Phasor Telecom Ltd*. (1988) 23 B.C.L.R. (2d) 354:

-Facts: sheriff seizes judgement debtor’s software and Instruction manual under writ of seizure and sale. Judgement debtor argues that software is intangible intellectual property and thus not subject to a writ of seizure and sale.

-Ratio: intellectual property cannot be seized under s. 55 of the COEA. However, instruction manuals are tangible and may be seized. Court can order sale on terms to protect the intellectual property. S. 55 is limited to tangible personal property/chose in possession.

## Execution against Money and Securities for Money

-Ss. 58-61.1 of the *COEA* allow for the seizure and sale of intangibles evidence by paper. Includes bank notes, money, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money.

Note: cheques cannot be seized directly from Canada Post because they only become property of the judgment debtor when they are delivered. Some cheques, such as welfare and pension cheques, are also protected from seizure and sale.

*Re Patmore* (1962) 39 W.W.R. 460 (B.C.S.C.):

-Bearer shares are exigible as money and may be seized and sold under s. 58. It does not matter where the corporation is located which issued the shares.

*Canadian Mutual Loan & Investment v. Nisbet*, [1900] O.J. No. 175 (Ont. Div. Ct.):

-A paid up life insurance policy is a security for money.

*-Securities Transfer Act*:

-Certificated securities: s. 48

-s. 48(1): Court bailiff must seize the share certificate.

-s. 48(2) if certificate is been surrendered to issuer, then court bailiff can serve notice of seizure on issuer’s chief executive office (extraterritoriality problem if issuer is located outside of BC).

-Uncertificated securities: s. 49

-Seizure requires service of notice on chief executive office (same extraterritoriality problem if outside BC).

-Security entitlements: s. 50

-Seizure requires service on broker where account is maintained.

-Securities and security entitlements pledged to a third party: s. 51

-Can be seized by serving notice on the secured third party.

*-COEA*, s. 63.1: after seizing one of the above securities (aside from a certificated share in the possession of the judgment debtor), the seizure becomes effective once the issuer or securities intermediary has had a reasonable opportunity to act on the seizure. Seizure is not immediate. Sheriff can seize securities in accordance with *STA*.

*-COEA*, s. 64.1: governs disposure of seized security. Court bailiff is deemed to be an appropriate person under the *STA* to deal with or dispose of the security. Judgment debtor ceases to be an appropriate person when security is seized. Court bailiff may execute, endorse, or do anything that the judgment debtor could have done with the security (including, presumably, sell it).

*-COEA*, s. 65.1(5): governs securities with transfer restrictions. Court bailiff must abide by restrictions in disposing of the security. However, the Court may order the restrictions void if they were fraudulently imposed on the security (so that the judgment debtor could frustrate execution).

*-Judgments Acts, 1838 and 1840*:

-Creates charging order that can charge government stocks/bonds or annuities and stocks or shares of any public company in England (probably BC).

-Can be used to charge funds in court without engaging the *Creditor Assistance Act*.

-Only available post-judgment.

-Application is *ex parte*.

-Order nisi triggers show cause hearing. Judgment debtor or other interested party can show cause why the order should be discharged.

-New application is required for order absolute. Followed by six-month waiting period which starts when order nisi is made. Possibility for optional show cause hearing at this stage.

-Court makes order for sale (must convert order absolute into order for sale)

-Judgment creditor is entitled to full proceeds.

-If no order absolute, then discharge.

*Consumer Imagenet Inc. v. Infinitron International Inc*., 2001 BCSC 372:

-*Judgments Acts* charging orders are available for BC companies as well as other companies with a substantial presence in BC (such as a federally incorporated company that has a head office and share office in BC).

# Execution against Land

Five steps to register against land:

1. Register judgment against title (can be done immediately).
2. Show cause hearing.
3. Order for sale.
4. Sale.
5. Distribution of proceeds.

*Re Schiava’s Judgment* (1960) 32 W.W.R. 239 (B.C.S.C.):

-You can register against land without executing first against personal property. There are no preconditions or requirements that state that judgment debtors have to register against other properties or use other remedies before registering against land.

*Mion v. Mion Estate* (2013): confirms *Re Schiava*. You can immediately go after land.

-*COEA*, s. 81: broad definition of land. Includes buildings on land.

-*COEA*, s. 83: renewal: you have to renew registration within two years unless it is a family law judgment pursuant to s. 26(5) of the *Family Maintenance Enforcement Act*. Judgments for maintenance/support stay on title forever.

*-COEA*, s. 86(3): effect of registration is to immediately create lien and charge on the land.

-*COEA*, s. 86(5): registration goes against any future interests held by debtor.

-*COEA*, s. 88: registration against land involves delivering copy of judgment to land title office.

-*COEA*, s. 92: show cause hearing.

-*COEA*, s. 94(1): order for inquiry if can’t show cause.

-*COEA*, s. 96: order for sale. Court has discretion to impose terms and conditions under s. 96(2). Usually debtor’s home.

-*COEA*, s. 104: sheriff may adjourn sale to get best available price.

-*COEA*, s. 110: monies realized from land are deemed be pursuant to *CAA*.

*Butler LaFarge v. Lowe*: if you don’t keep your judgment registered, it falls away. You can re-register, but then you lose priority.

*Bank of Montreal v. Jacques*, [1988] B.C.J. No. 500:

-Judgment debtor cannot get rid of lien and charge on land by selling land to third party. If the third party is aware of the judgment, it will run with the land. If in land title office, third party is deemed to have known.

*Bank of Montreal v. Fulthorp*, 2006 BCCA 166:

-If land has already been transferred, even if the transfer hasn’t yet been registered at the land title office, the judgment creditor cannot register the judgment against title. Underlying principle is that judgment creditor cannot seize property that does not belong to the judgment debtor.

Joint ownership of land: you can’t seize joint debts or personal property; however, you can register judgment against land held in joint tenancy. This does not mean that you can get an order for sale, however.

*CIBC v. Muntain and Muntain and Muntain,* [1985] B.C.J. No. 3075(B.C.S.C.):

-You can register judgment against title, but *lis pendens* or judgment does not sever joint tenancy. Only a sale or death can sever joint tenancy. If the judgment debtor owner dies and the other owner is not a judgment debtor, you cannot realize against property and the *lis pendens* or judgment will be discharged.

-Court has discretion not to order sale under s. 96(2) or to impose terms and conditions. Courts tend to be reluctant to order the sale of matrimonial homes, especially those inhabited by pensioners where one is a judgment debtor and the other is not.

*First Western Capital v. Wardle*, [1984] B.C.J. No. 2059 (B.C.C.A.):

-*COEA* is not a complete code. Court has jurisdiction to supervise sale even though this is not provided for in the statute, including making order that sale is subject to judicial approval. This type of order is most appropriate when a matrimonial home is subject to a sale.

*Topouzis v. Abboud*, 2012 BCSC 1379:

-The Court may impose conditions on the sale of property, including the deferral of its sale (if the property is likely to increase in value) or ordering the sale to be conducted by a real estate agent instead of a court bailiff.

*-COEA*, s. 110: money realized by sale of land is deemed to be money levied pursuant to the *Creditor Assistance Act*.

*Roadburg v. British Columbia*, [1980] B.C.J. No. 4 (B.C.C.A.):

-In foreclosures, the lien and charge created by registration of judgment against title is transferred to the fund in court.

-*CAA* does not apply to foreclosure proceedings. Payment is made out on the basis of the order of registration on title.

# Equitable Relief

## Mareva Injunctions

Requirements for a *Mareva* Injunction:

1.) The Court (any Canadian common law court) must have jurisdiction. Without jurisdiction, you cannot issue an injunction.

2.) The plaintiff must have a good arguable case.

3.) The Court must be persuaded that there is a real risk of a dry judgment.

4.) It must be just and convenient to issue injunction.

*Aetna Financial Services v. Feigelman*, [1985] 1 SCR 2:

-Case establishes that *Mareva* injunctions are available in Canada. This is an exception to the rule in *Lister & Co. v. Stubbs* that the Court cannot order the defendant to give security before judgment.

-You cannot get a *Mareva* injunction when a defendant is moving assets from one province to another.

-Test for *Mareva* injunction:

-Plaintiff must have a “strong prima facie case” and there must be “a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets ‘to avoid the possibility of a judgment.’”

*Mooney v. Orr [1]* (1994), 98 B.C.L.R. (2d) 318 (B.C.S.C.):

-BC courts have the jurisdiction to order worldwide *Mareva* injunctions against defendants within the province. These are *in personam* orders.

-Steps for obtaining a *Mareva* injunction include: 1.) make full disclosure of all relevant and material facts on ex parte application, 2.) satisfy Chamber judge that there is a “strong prima facie case” (this is changed by *Mooney v. Orr [2]* below) and that there is a “real risk” of removal or dissipation of assets to avoid judgment.

-For a *Mareva* injunction enjoining the transfer of assets worldwide, there must also be assets located outside of BC which, if dissipated or concealed, would frustrate any judgment obtained against the defendant. The fewer assets that the defendant has in BC, the more likely the Court will be to grant the injunction.

-A “real risk” must be substantiated, “not simply an apprehension arising out of the suspicion that normally exists between litigants, or a stratagem to obtain security for costs not otherwise available under the Rules.”

*Mooney v. Orr [2]* (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.):

-Plaintiff needs to establish a good arguable case, not prima facie case.

-“Exceptional circumstances” must be present to justify a worldwide *Mareva* injunction. This may be satisfied by the defendant having a foreign residence and having a history of complicated international business dealings.

-Court may consider relevant factors such as the nature of the transaction giving rise to the cause of action (whether it is local, national, or international), the risks inherent in that transaction, the residency of the defendant, enforcement rights for judgment creditors in the jurisdiction where the defendant’s assets are located, the amount of the claim, and the history of the defendant’s conduct.

-The ultimate question is whether it is fair and just that the plaintiff should have the right to monitor the movement or expenditure of capital assets by the defendant during the course of proceedings between them.

*Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2887 (B.C.C.A.):

-Case discusses the differences between *Mareva* injunctions and pre-judgment garnishing orders.

-Unlike *Mareva* injunctions, pre-judgment garnishing orders do not require that the defendant has an intention to avoid paying the judgment that may be eventually entered against him or her.

-In deciding whether to discharge a pre-judgment garnishing order, the Court is not as concerned with the effect of the order on third parties as it is with *Mareva* injunctions. In granting a *Mareva* injunction, the Court must consider whether the balance of justice and convenience favours an injunction. If the injunction will result in the defendant being unable to pay a debt incurred to a third party in the ordinary course of business, then the *Mareva* injunction will likely not be in the interests of justice and convenience.

-Both require a local action.

*Hickman v. Kaiser* (1996) 28 B.C.L.R. (3d) 195 (B.C.S.C.):

-Plaintiff may apply for a post-judgment garnishing order where there is a real risk that the judgment debtor will dissipate their assets.

*Tracy v. Instaloans Financial Solutions Centers (B.C.) Ltd*., 2007 BCCA 481:

-Mareva injunctions are available for class actions. Representative plaintiff will not be bound by undertaking in damages.

-Quantum of assets subject to injunction mwill be based on the amount of claim.

-There are no open ended Mareva injunctions. Court can order applicant to enter into undertaking to expedite the trial so that the defendant will not be bound by Mareva for too long.

-Confirms *Mooney v. Orr [2]* that standard in BC is good arguable case.

*JSC BTA Bank v. Ablyozov*:

-English case. Failure to comply with order for disclosure of assets is contempt and may result in striking of pleadings and committal to prison.

## Checklist: Pre-judgment Garnishing Orders vs. Mareva Injunctions

|  |  |
| --- | --- |
| Common law remedy codified in *COEA*. | Equitable remedy. |
| In rem: debt is seized. Garnishee must be in the province. | In personam: property may be located anywhere in the world |
| Limited to debts. | Not limited to debts. |
| No concern with defendant’s state of mind. | Plaintiff must establish defendant’s state of mind. |
| Debt is paid into court. | Assets are frozen. |
| Requires local action. | Also requires local action. |
| Requires a claim for debt or liquidated damages. | Can be for any claim. |
| No ancillary order for discovery. | Plaintiff can apply for ancillary order for discovery. |

## Equitable Receivers

Rules and principles governing the appointment of equitable receivers:

1.) The property must be exigible at common law.

2.) If exigible, the court will ask if there is an impediment to execution at common law. Impediment can be legal or practical. (If there is no impediment, are there special circumstances here?)

3.) Is it just and convenient in the circumstances to appoint an equitable receiver?

Note: equitable receivers are ordinarily used post-judgment but may also be used pre-judgment.

Exigibility at common law: depending on whether you are a judgment creditor or a judgment debtor, you will want the Court to ask either a wide or narrow question about exigibility. There are three approaches:

1. Is this class of assets exigible at common law? (broadest and most judgment creditor friendly)
2. Is this asset exigible at common law? (narrower approach)
3. Is this asset immediately exigible at common law? (narrowest and most judgment debtor friendly)

*Vancouver A & W Drive-Ins Ltd. v. United Food Services*, [1981] B.C.J. No. 2210:

-Facts: judgment creditor wanted to get at shares held in judgment debtor’s RRSP (case preceded amendments making RRSPs non-exigible). The shares in question were not exigible.

-Ratio: example of the widest question being asked: is this class of property exigible at common law? Shares as a class of asset were exigible, even though these particular shares couldn’t be executed against at common law.

*Re Peterson Livestock and Fox* (1982) 131 D.L.R. (3d) 716 (Alta. C.A.):

-Facts: judgment debtor was an aboriginal living on reserve. Was due to receive payment from Crown for mining on reserve land.

-Ratio: funds that are “payable from time to time” and thus not “due or accruing due” are not subject to equitable execution. In order to get an equitable receiver appointed, there must be a legal to get at the funds which prevented by the existence of legal difficulties. Judgment creditors have a legal right to have their debts paid, but not out of the future earnings of the debtor. Future earnings are not attachable at law by any process of execution.

-Example of the narrowest question: is this asset currently exigible at the time of the appointment of the receiver?

*NEC Corp. v. Steintron International Electronics Ltd*., [1985] B.C.J. No. 246 (B.C.S.C.):

-The Court may appoint an equitable receiver where the plaintiff seeks to have an equitable interest sold or where there are special circumstances that render it practically very difficult, if not impossible, for the judgment creditor to obtain the fruits of his or her judgment.

-Where there are clear indications of fraud and where the assets are exigible at common law, the Court may order an equitable receiver over all assets based on the model receivership order in practice direction 30. This is an exercise of discretion in “special circumstances.”

-Note: such all encompassing orders in practice direction 30 are probably not intended for equitable receivers but rather receivers under the BIA or receivers appointed by contract.

*Interclaim Holdings Ltd. v. Down*, 2002 BCSC 1023:

-Court accepts that worldwide equitable receivers might be possible in BC.

-The fact that the judgment debtor has limited assets in BC and is going bankrupt in another jurisdiction is insufficient to justify the appointment of a worldwide equitable receiver because there was no impediment to seeking enforcement of judgment in another jurisdiction. More is required in order to meet special circumstances threshold.

*Klyne v. Young*, [1996] B.C.J. No. 1502 (B.C.S.C.):

-If an asset is immune to all forms of execution under statute (such as a pension), then you cannot get an equitable receiver appointed as a matter of statutory interpretation (“execution” used in pension legislation includes equitable receivers).

*Masri v. Consolidated Contractors*:

-English case that says you can get a world-wide equitable receiver. Equitable receivers operate in personam, not in rem. Equitable receivers may collect future profits.

-This case has not (yet) been followed in BC.

## Equitable Charging Orders

Equitable charging orders are modeled on *Judgments Acts* charging orders. They are only used to charge property that is *in custodia legis* which the judgment debtor is presently entitled to.

*Chima v. Hayduk*, [1976] B.C.J. No. 1232 (B.C.C.C.):

-Equitable charging orders can be used to charge funds that have been paid into court, including those that have been paid into court as a result of a garnishment order in another action and where some of those garnished funds are left over. Where there are no other creditors, the Court may order immediate payment of the funds charged (otherwise, you need to wait six months).

*Rennison v. Sieg*, [1979] B.C.J. No. 916 (B.C.S.C.):

-Where there are multiple creditors, and you apply for a charging order to charge funds held in court, you will have to wait six months to get paid (order absolute) after the order nisi.

*Creditor Assistance Act*, s. 26: alternative to waiting six months. Court bailiff will hold funds for one month and then funds are distributed *pro rata* to creditors.

*Accredit Mortgage Ltd. (Inc. No. 473728) v. Grealy* (1999) (B.C.S.C.): equitable charging orders may be made against funds held in the hands of a trustee where legal execution would be otherwise available (funds held by trustee cannot be garnished).

*Canada v. Millar*, 2006 BCSC 734:

-Clean hands doctrine applies to equitable charging orders. If the Crown comes into possession of bag of money by an illegal search, it should not be able to charge it. However, argument fails on facts because Court refuses to equate West Van police with the Canada Revenue Agency.

# Enforcement of Federal Court Judgments

*British Columbia (Deputy Sheriff, Victoria) v. Canada*, [1992] B.C.J. No. 810 (B.C.C.A.):

-*Creditor Assistance Act* does not apply to federal court judgments or certificates. First in time, first in right is the rule for competing judgment creditors in the federal court system.

-Federal court certificates have the same force and effect as judgments.

-A writ of *fi fa* issued under certificate by the federal court is complete once the goods are seized. At that time, the first creditor to issue the writ is entitled to the proceeds of the sale.

*Hong Kong Bank of Canada v. Canada*, [1989] B.C.J. No. 798 (B.C.C.A.):

-If a federal court judgment creditor registers judgment against title to land in BC, the distribution of proceeds from the sale will be pursuant to the *CAA* and will be *pro rata*. If the federal court judgment creditor wants to avoid *pro rata* distribution, they can get a federal court writ against land.

# Fraudulent Conveyances and Preferences

## Fraudulent Conveyance Act

Components of a fraudulent conveyance action:

1. Actus reus: disposition of property that is currently exigible in the province. Diposition includes anything you can do with property.
2. Mens rea: intent to delay, hinder or defraud on the part of the transferor. Double intent (intent by the transferee) is required if the transferor claims that there was a bona fide disposition for value.
3. Protected classes: creditors and others.
4. Protected dispositions which the *FCA* cannot be used to attack: dispositions of property to *bona fide* purchasers for value who have no notice or knowledge of collusion of fraud at the time of the transfer.

(note: burden of proof is on plaintiff except where the disposition was to a near relative.)

*Mawdsley v. Meshen*, 2012 BCCA 91:

-Plaintiff must prove that defendant’s intent. Intent cannot be inferred from the effect of the transfer.

-Creditor means someone to whom a debt or obligation is owed or someone who is entitled to the fulfillment of an obligation. “And others” refers to persons who do not have debts owing to them but who do have just claims that have not yet been brought to fruition in the legal process. May include anyone who has a legal or equitable claim at the time of the transfer. Moral claims do not give rise to an action. People who have no claim at the time of the transfer cannot use the *FCA*.

*Canadian Imperial Bank of Commerce v. Boukalis*, [1987] B.C.J. No. 86 (B.C.C.A.):

-“Creditors and others” includes formerly secured creditors who have become unsecured creditors.

*Solomon v. Solomon et al.*, [1977] O.J. No. 2349 (Ont. H.C.):

-Double intent: there must be some level of knowledge or collusion on the part of the transferee.

-Badges of fraud:

-Secrecy.

-Generality of conveyances (all or substantially all of the transferor’s assets have been conveyed).

-Continuance in possession by transferor after conveyance.

-Some benefit retained under the settlement to the settlor.

-Gross excess of value of property over price paid.

-Cash instead of cheque payment.

-Badges of fraud for double intent:

-Knowledge of the likelihood of a successful action by the plaintiff against the transferor.

-Unusual haste in closing.

-No immediate or early change of possession following conveyance.

-Joint possession by transferor and transferee.

-Relationship between parties to the conveyance.

*Chan v. Stanwood*, 2002 BCCA 474:

-Facts: Chans have judgment against Standwoods. Stanwoods are also facing bankruptcy. Stanwoods consult lawyer who wrote about family holding companies and advises them that unsecured creditors cannot insist that the debtors preserve assets in a particular form. Stanwoods transfer all assets to two private holding companies and place transfer restrictions on shares, making it more difficult for Chans to execute against them (case is pre-*Securities Transfer Act*).

-Although the shares were exigible, the transfers were made with the intent of putting the assets beyond the Chans’ reach and the share restrictions made the shares not worth executing against. Even though the transfer was for good consideration, the transferors and transferees were the same people (Court pierces corporate veil) and sets aside transfer.

-Ratio: court can pierce corporate veil in *FCA* actions. Where the transfer leaves the asset technically exigible, but very difficult to execute against, the transfer may still be set aside.

## Fraudulent Preference Act

-A preference may be set aside if the defendant was insolvent at the time the preference was made and you were a creditor at the same time (not very useful).

-Plaintiffs in actions under the *FCA* can use remedies under the *FPA* without the defendant being insolvent.

Useful remedies under *FPA*:

-s. 7: if a property is fraudulently disposed of, you can trace it and recover from the transferee.

-s. 9: you can apply to set aside fraudulent transfers of land without starting a new action; instead, you get a show cause hearing at the BCSC. Debtor must show cause why disposition shouldn’t be set aside.

# Exemptions and Immunities

-*COEA*, s. 70: debtor is defined to include personal representative (if dead), or when debtor is absent, any member of debtor’s household. Any one of these people can claim an exemption.

-*COEA*, s. 71: allows debtor to keep essential items, such as necessary clothing of debtor and dependents, household furnishings not exceeding $400, one motor vehicle not exceeding $5000 ($2000 for family debtor), tools related to occupation and for the purpose of earning income not exceeding $10,000, and medical and dental aids. (note: pets are exigible. Bismarck could technically be seized and sold by a court bailiff.)

-*COEA*, s. 71.1: principal residence is exempt from forced seizure and sale by any process at law or in equity if the value is less than $12,000.

-*COEA*, s. 71.2: for real estate, if value is over $12,000, then property is exigible and can be sold, but judgment debtor gets to keep $12,000 from proceeds.

-*COEA*, s. 71.3: RRSPs and RRIFs are immune from execution subject to exceptions for payments made in last 12 months and payments made out of plan.

-*COEA*, 72(1): Art and objects of cultural significance that are in BC for temporary exhibition are exempt from seizure and sale.

*Re Lee and Rathsburg et al*., [1978] B.C.J. No. 1225:

-Judgment debtor needs to make claim for exemption within two days of seizure by court bailiff.

*Royal Bank of Canada v. Nguyen*, 2004 BCSC 895:

-Court gives a large and liberal interpretation to s. 71.1. Includes situations where debtors sell property because a forced sale is impending. Exemption also applies to forced sales in foreclosure proceedings.

*Re Atwal*, 2012 BCCA 46:

-If a vehicle worth more than $5,000 is seized and sold, the judgment debtor gets $5,000 back from the proceeds.

-*COEA*, ss. 4, 5, 6: wages are immune from pre-judgment garnishment and a percentage exemption is available for post-judgment garnishment.

-Government benefits are generally immune from seizure or garnishment.

-*Insurance Act*, ss. 65(1) and (2): life insurance payments to beneficiary are not part of the estate. Estate’s judgment creditors cannot get at the payments.

-*Workers Compensation Act*: workers comp benefits are immune from attachment or charging.

-*Crown Proceeding Act*: (provincial) no executions or attachments or similar processes when judgment debtor is government.

-*Crown Liability and Proceedings Act*: (federal) no execution against the Crown.

-*Canada Pension Plan*: CPP benefits cannot be charged, attached, assigned, given as a security, seized or executed against at law or in equity.

-*Old Age Security Act*: OAS benefits cannot be assigned, charged, attached, anticipated, given as security, seized or executed against at law or in equity.

-*Indian Act*, s. 89(1): real or personal property on reserve is immune.

*Williams v. Canada*, [1992] 1 SCR 877:

-To determine the *situs* of intangible personal property (whether it is on or off reserve), the Court should evaluate the various connecting factors which tie the property to one location or another.

-In the context of the exemption from taxation in the *Indian Act*, the connecting factors which are potentially relevant should be weighed in light of three important considerations:  the purpose of the exemption; the type of property in question; and the incidence of taxation upon that property (third factor is not relevant to execution proceedings).

*Bastein Estate v. Canada*, [2011] SCC 38:

-Facts: status Indian lives whole life on reserve. Keeps money at a caisse populaire on the reserve. CRA argues that income was not located on reserve because the caisse popular generated income in mainstream business outside of the reserve.

-Ratio: case upholds *Williams* approach to locating intangible personal property. Income earned at bank or credit union on reserve is protected from execution under the *Indian Act*.

# Priorities

-*Creditor Assistance Act*: modifies first in time principle by partially abolishing priorities among unsecured creditors. S. 3: money collection under an execution sale must be distributed ratably among all creditors and other creditors whose writs and certificates were in the court bailiff’s hands at the time of execution or within 30 days following execution.

-*CAA*, s. 2: court bailiff who has received funds under a writ of seizure and sale for a judgment creditor must enter the levy into a book, writing down the date of the levy and the amount. The book must be kept in the court bailiff’s office and must be open to inspection by the public without charge.

-Certificates: if a creditor does not have a judgment but want to share in the proceeds pro rata, they can get a certificate of claim. Procedure involves serving an affidavit setting out claim on the debtor (s. 7), file it with the district registrar (s.8), and if the claim is not contested by the debtor within 10 days of service, apply to the district registrar for a certificate (s. 11). Once the creditor has the certificate, they become an execution creditor within the meaning of the *CAA* and are entitled to share in the proceeds pro rata (s. 11(3)). The certificate is good for three years and can be renewed (s. 13).

-*CAA*, s. 23: if there are no other writs (not certificates), and the judgment debtor pays the court bailiff instead of having his or her stuff sold, then the assets are not a levy pursuant to the *CAA*.

-*CAA*, s. 38: court bailiff is authorized to prepare a plan for distribution after 30 days. If the levy is insufficient to meet all the claims, the court bailiff may either distribute the money promptly pro rata or prepare a list of creditors with the amount due to each and then let the creditors and the debtor examine the list.

*Tan et al. v. American Corporate Suites (Canada) Inc*., 2001 BCSC 670:

-In order for the *CAA pro rata* distribution scheme to be engaged, there must be a levy within the meaning of the *CAA*. A levy occurs with the court bailiff receives money as a consequence of execution. Does not cover garnishing orders.

Note: payments made under Subpoena to Debtor proceedings or installment orders are not covered by the *CAA*.

*Benjamin Moore & Co. Ltd. v. Finnie*, [1954] O.J. No. 626 (Ont. C.C.):

-Levy occurs when court bailiff receives money. If court bailiff does not receive money until after the execution or garnishing order is made, then the date which the levy occurs will be the date on which the proceeds are received by the court bailiff. All creditors who bring writs to the sheriff during the period between the execution date and the date when the sheriff receives the proceeds are entitled to *pro rata* distribution.

*Hankin Furniture Industries Ltd. v. Gill* (1980) 16 E.C.L.R. 311 (B.C.S.C.):

-Probably wrongly decided case in which the Court ordered that the judgment creditors should receive proceeds of sale of land *pro rata* with the remainder going to the mortgagee. Mortgagee is effectively dispossessed of security. The *CAA* was not intended to allow this to occur.

-If distribution is wrong or unjust, the judgment creditors may object to the court bailiff.

*MacMillan Bloedel Ltd. v. Kasiks River Contracting* (1984) 1 D.L.R. (4th) 758 (B.C.C.A.):

-Judgment creditors who have delivered writs to the sheriff before the levy or within 30 days of the levy, and claimants who have priority (such as the Director of Employment Standards) but who have not complied with the timeline in the CAA, can object to the court bailiff’s distribution plan.

# Special Creditors

## Family Creditors

*-Family Maintenance Enforcement Act* provides for special remedies for family creditors.

-s. 8: family creditors can search provincial and federal -databases to get information about the debtor.

-s. 15: Director may get continuing attachment orders including attachment orders for debts that are not yet due and accruing due. Director may also attach joint bank accounts.

-s. 17: recognizes and enforces extra-provincial family garnishment orders.

-s. 25: no Crown immunity in family debt actions.

-s. 26: family judgments against land don’t expire.

-s. 26.1: family judgments can be registered against personal property.

-s. 28: family judgments have priority over all other unsecured creditors regardless of time of issuance or service of writs.

-s. 28(2): priority arrears owing are limited to 12 months. Extra arrears are dealt with *pro rata*.

-s. 29(1): family debtor can have driver’s licence taken away.

-s. 29: allows appointment of equitable receiver over property of debtor, whether that property is exigible at law or not.

-s. 31: if the debtor tries to abscond from BC to evade the enforcement of a maintenance order, he or she can be arrested.

## Employees

-*CAA*, s. 36(1): employees have priority for three months of wages.

-*Employment Standards Act*, s. 87: creates lien for unpaid wages that is payable and enforceable over all other liens, judgments, charges and security interests or any other claims.

-*Builders’ Lien Act*, s. 37(2)(b): workers get priority for up to six weeks of wages when distributing holdback funds.

## Artisans

-*Woodworker Lien Act*, *Repairers’ Lien Act*, and *Livestock Lien Act* all give liens in favour of artisans and grant them the power to sell the property.

# Builders’ Lien Act

-s. 2: lien claimants include contractors, subcontractors, and workers who perform or provide work, supply material, or do any combination of these things. It does not apply to those who perform of provide work or supplies to an architect, engineer or material supplier. You don’t actually have to work on the site to make a claim; you can construction things off site and bring them to the site also.

-s. 20: 45 day limitation period to bring lien claim from one of three alternate dates:

-1.) the date on which the certificate of completion is issued;

-2.) if there is no certificate of completion, the date on which the head contract was completed (defined as substantial completion);

-3.) if there is no head contract, then from the date of completion of abandonment.

-s. 21: lien claimant has priority over all other general unsecured creditors, including all judgments, executions, attachments, and receiving orders issued after that date. The claim of lien takes effect at the time the work began or the time that the material was first supplied (retroactive application).

-s. 22: if you wait longer than 45 days, your lien claim is extinguished.

-s. 23: removal of lien if smaller than holdback.

-s. 24: if liens exceed holdback, the court can remove them with conditions.

-s. 33: actions to enforce lien must be commenced within one year of the date of filing. Owner can speed this up by demanding a speedy trial, which forces the registration of certificate of pending litigation within 21 days. S. 33(4) allows service of this notice to be by Canada Post (deemed received after eight days).

-s. 19: liability for wrongful filing of liens, such as using liens as a form of blackmail. Mere mistakes are not caught under this section.

-Holdbacks: 10 percent holdback applies at each level of the pyramid. 10 percent is minimum. Owner can hold back more.

-s. 8: owner must hold holdback for 55 days. Lien claimant has 45 days to file. If no lien claims are filed, owner may return 10 percent to contractor.

-s. 23: if lien is filed, owner may pay the holdback into court.

-s. 24: if lien claims exceed holdback, court may order the lien claims cancelled on giving security (which can be set as total amount of lien claims filed). Owner can pay full favlue of lien claims into court or ask for lesser amount as security.

-s. 25: provides simplified procedure where clearly deficient liens can be cleared from title without a full trial. Useful for clearing nuisance liens without posting security.

-s. 10: money received by contractor or subcontractor on account of contract is deemed to be trust monies. Contractors or subcontractors cannot appropriate any of these monies until all the beneficiaries have been paid.

-s. 14: limitation period for claiming against trust monies is 1 year.

*Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd*., 2002 BCSC 238:

-Facts: plaintiff failed to register *lis pendens* in land title office within one year as required under s. 33 of the *BLA*. As a result, lien against land is extinguished pursuant to s. 33(5). Plaintiff then decides to file lien against the holdback monies, which had not yet been paid out at the time.

-Ratio: you can bring a claim against the holdback even if you have run out of time to file a lien against the land. There is no specific time limit to bring a claim against the holdback monies provided they haven’t been paid out.

*Re Groves-Raffin Construction Ltd. (No. 2.)*, [1978] 4 W.W.R. 451 (B.C.S.C.):

-Facts: director of construction companies takes progress payment in cash from Scotiabank and absconds to Australia. Construction workers sue Scotiabank as a constructive trustee. Court agrees, finding that what had gone on was completely outside of the ordinary course of banking business and that Scotiabank was negligent in allowing the director to take the trust funds.

-Ratio: in limited circumstances, the beneficiaries can sue the bank to recover funds taken by someone higher up in the pyramid.